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In the Supreme Court of the United States

OCTOBER TERM, 1995

DENNIS J. BALDASSARO
Petitioner

VERSUS

UNITED STATES OF AMERICA
Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT,
UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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59 pp

QUESTIONS PRESENTED FOR REVIEW

1) May courts ignore clear Congressional enactments by implying selected limitations borrowed from other legislative authority, where the plain language of the enactment contains no ambiguity as to the Congressional intent?

2) May a Jones Act Seaman's established right to maintenance benefits be abrogated by any type of private agreement, where the daily amount of benefits ignores economic reality by providing a rate inadequate to support an injured seaman's recognized daily food and lodging needs?

PARTIES TO THE PROCEEDING

Dennis J. Baldassaro

United States of America

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JURISDICTION

Jurisdiction in this Court is founded upon 28 U.S.C.A. 10.1(a) and its discretionary authority pursuant to considerations governing review on Writ of Certiorari.

DECISIONS BELOW

1. On September 1, 1994, Order of the United States District Court, Eastern District of Louisiana, Civil Action Number 93-CV-1871, Dennis J. Baldassaro v. United States of America, granting motion for summary judgment filed on behalf of United States of America.

2. On September 29, 1994, The District Court amended the original order. This amended order dismissed the Plaintiff's claims for adequate maintenance above the $8.00 per day amount contained in his union contract.

3. The United States Court of Appels for the Fifth Circuit affirmed the lower court's decision which dismissed the claims of Dennis J. Baldassaro, September 15, 1995, *Baldassaro v. United States,* 64 F.3d 206 (5th Cir. 1995).

STATEMENT OF THE CASE

Petitioner, Dennis J. Baldassaro filed suit against his employer, the United States of America, for injuries he sustained while working aboard the vessel CAPE CARTHAGE. On July 14, 1991, Baldassaro gripped a rail positioned at the foot of his upper bunk and attempted to ascend to his berth. When he reached the top of the bunk ladder, the rail slid out of its holes and caused Baldassaro to fall upon the metal deck floor below. Baldassaro brought suit against the United States for its negligence in failing to secure a railing which is used to gain access to the upper bunk pursuant to the War Shipping Administration Act, 50 U.S.C.A. § 291, as well as the Suits in Admiralty Act, 46 U.S.C.A. § 741-42.

The United States of America filed a motion for summary judgment, disputing the court's subject matter jurisdiction. The United States alleged that the design of the bunk was a "discretionary function", and that the United States had not waived its immunity under that doctrine. Petitioner contended, among other arguments, that the discretionary function exception does not apply to the Suits in Admiralty Act, as this defense is not explicitly included in the statute.

On September 1, 1994, the United States District Court, Eastern District of Louisiana, Division "N", Civil Action Number 93-CV-1871, Dennis J. Baldassaro v. United States of America, granted the motion for summary judgment filed on behalf of United States of America.

Furthermore, during the pendency of Baldassaro's claim, he received a daily maintenance benefit of $8.00 as stipulated in his contract with the Seafarer's International

Union ("SIU"). The district court upheld the $8.00 rate, deferring to the provisions in the SIU contract. Petitioner contended that the $8.00 daily rate for maintenance, which is supposed to provide the seaman with food and lodging comparable to that aboard ship, is an insufficient sum. Such a meager allowance effectively abrogates Petitioner's legal right to maintenance benefits.

Although the United States Court of Apeals for the Fifth Circuit acknowledged competing decisions from other circuits on both issues, it affirmed the lower court's decision which dismissed the claims of Dennis J. Baldassaro, September 15, 1995.

ARGUMENT

1. USURPING CONGRESSIONAL AUTHORITY, THE FIFTH CIRCUIT NURTURED A RIFT IN THE CIRCUITS BY IMPLYING A DISCRETIONARY FUNCTION EXCEPTION IN THE SUITS IN ADMIRALTY ACT WHERE ONE CLEARLY DOES NOT EXIST

The Suits in Admiralty Act was enacted in 1920 as a waiver of the United States' sovereign immunity for admiralty claims arising from the use of government-owned ships as merchant vessels. 46 U.S.C.A. §§ 741-752. The relevant portion of the Act provided that in cases where such vessels were privately owned or operated, an in personam action could be brought against the United States. 46 U.S.C.A. § 742.

In 1960, Congress amended the Suits in Admiralty Act

in order to resolve the jurisdictional problem of the proper forum for a complaint that contains both admiralty and contract elements. This amendment also attempted to eliminate confusion over the meaning of the terms 'employed as merchant vessel' and 'public vessel', terms which respectively determined whether an action may be brought under the Suits in Admiralty Act or its sister act, the Public Vessels Act. 46 U.S.C.A. §§ 781-790 (1976). The amendments also removed language restricting causes of action under the Suits in Admiralty Act to damages caused by a government vessel employed as a merchant vessel and inserted language that extended coverage of the Act to all admiralty causes of action that could be brought against a private person or his property. 46 U.S.C.A. § 742 (1976). The Suits in Admiralty Act clearly is devoid of any exception based on a discretionary function, and none of its amendments have included such a provision.

As a result of the decisions allowing this broader coverage, the Suits in Admiralty Act now embraces in its admiralty jurisdiction tort claims against the government that previously could have been brought only under the Federal Tort Claims Act, 28 U.S.C.A. § 2680. Additionally, because the Federal Tort Claims Act specifically excludes claims cognizable under the Suits in Admiralty Act and the Public Vessels Act, these two statutes are now the exclusive vehicles for bringing such tort suits.

The discretionary function exception is set forth solely in the Federal Torts Claims Act. It limits the United States' waiver of sovereign immunity under the Act by providing that the waiver will not apply to:

> [a]ny claim based upon an act or omission of any employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such a statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of federal agency or an employee of the Government, whether or not the discretion involved be abused.

28 U.S.C.A. § 2680(a) (1990).

When one considers and reviews the Suits in Admiralty Act it is clear that it does not contain an exception for the discretionary acts of government employees from coverage as does the later enacted Federal Torts Claims Act, 28 U.S.C.A. §§ 2761, et seq., which became effective January 1, 1945. *Wiggins v. U.S. Through Dept. of Army,* 799 F.2d 962, 964 (5th Cir. 1986).

Indisputably, the goal of statutory construction is to ascertain legislative intent through the plain language of the statute without looking to its legislative history or other extraneous sources. *Matter of Stone,* 10 F.3d 285 (5th Cir. 1994). In construing a statute, the court may not treat the purpose of the statute, rather than its operative words, as the law. *Orca Bay Seafoods v. Northwest Truck Sales, Inc.,* 32 F.3d 433 (9th Cir. 1994). In a statutory construction case, the beginning point must be the language of the statute, and when the statute speaks with clarity to the issue, judicial inquiry into the statute's meaning is finished. *Estate of Cowart v. Nicklos Drilling Co.,* 505 U.S. 469, 112 S.Ct. 2589, 120 L.Ed.2d 379 (1992).

The application of these well-settled principles to the issue of whether the Suits in Admiralty Act contains a discretionary function exception was made by the Fourth Circuit Court of Appeals in *Lane v. United States*. 529 F.2d 175 (4th Cir. 1975). In *Lane*, the owner of a cabin cruiser which sank after it collided with a sunken barge brought suit against the United States, alleging that the government had violated a mandatory duty either to remove the wreck or to mark it. The United States alleged that the discretionary function found in the Federal Tort Claims Act was also applicable to the Suits in Admiralty Act.

The Fourth Circuit began its analysis by noting that under the 1960 amendments to the Suits in Admiralty Act, the plaintiff's sole remedy was to proceed under the Suits in Admiralty Act and not the Federal Tort Claims Act. In rejecting the United States' argument, the *Lane* Court stated:

> There is no basis upon which we can import the many exceptions in the Tort Claims Act into the Suits in Admiralty Act, where the United States is to be held accountable whenever a private person, in similar circumstances, would be.

Id. at 179.

The limitation of the Suits in Admiralty Act to its exact wording is made evident further by the congressional mandate set forth by this Court in *Miles v. Apex Marine Corp.*, 498 U.S. 19, 111 S.Ct. 317, 112 L.Ed.2d 275 (1990). The wording of the *Miles* opinion reveals that any attempt to expand the remedies or defenses of a statute dealing with maritime issues is foreclosed by the clear language used in the statute.

In *Miles*, the heirs of a seaman killed by a fellow crew member sought to recover damages for loss of consortium under the general maritime law in an action for unseaworthiness. Loss of consortium is a nonpecuniary loss, and neither the Jones Act, 46 U.S.C.A. § 688 nor the Death on the High Seas Act, 46 U.S.C.A. § 761, permit recovery for such losses. In an attempt to create a uniform rule of damages applicable to the Jones Act, DOHSA, and the general maritime law, the *Miles* court refused to expand plaintiff's statutory recovery to include loss of society damages.

Specifically, this Court noted:

> We no longer live in an era when seamen and their loved ones must look to the courts as a source of substantive legal protection from injury and death; Congress and the States have legislated extensively in these areas. In this era, an admiralty court should look primarily to these legislative enactments for policy guidance. We may supplement these statutory remedies... but we must keep strictly within the *limits* imposed by Congress. (Emphasis added)

498 U.S. at 27.

Later, in a similar vein, this Court stated:

> We sail in occupied waters, Maritime law is now *dominated* by federal statute, and we are not free to expand remedies at will simply because it might work to the benefit of seamen and those dependent upon them. Congress has placed limits on recovery in survival actions that we cannot exceed. (Em-

phasis added)

Id. at 36.

The Fifth Circuit has held steadfast in applying the mandate of *Miles* when limiting a seaman's remedies which are in conflict with federal statutes. In *Michel v. Total Transportation, Inc.*, 957 F.2d 186 (5th Cir. 1992), for example, the court extended the preclusion of recovery for loss of consortium to personal injury cases. Citing *Miles*, the *Michel* court opined:

> It would be inconsistent with our place in the constitutional scheme were we to sanction more expansive remedies... than Congress has allowed... *Miles*, 111 S.Ct. at 326. We choose to follow the lead of *Miles* and hold that damages recoverable in general maritime causes of action for personal injury of a Jones Act seaman do not include loss of consortium.

See also Murray v. Anthony J. Bertucci Const.Co., 958 F.2d 127 (5th Cir.), *cert. denied*, ____U.S.____, 113 S.Ct. 190 (1992). Similarly, the analytical framework of *Miles* governed the Fifth Circuit's approach to eliminating punitive damages under the general maritime law in *Guevara v. Maritime Overseas Corp.*, 59 F.3d 1496 (5th Cir. 1995).

The Fifth Circuit, however, has charted its own course and has refused to apply the same strict interpretation of *Miles* when the United States has been made a defendant under the Suits in Admiralty Act. In *Baldassaro v. United States*, 64 F.3d 206 (5th Cir. 1995), the Fifth Circuit broke from its strict reliance on *Miles* to fashion an exception for the federal government. After consistently limiting the

remedies of seamen to those provided for in statute, the Fifth Circuit has now expanded the defenses of the United States government to include the discretionary function exception, a defense to be found nowhere in the Suits in Admiralty Act.

Compare the language expressing a deferential attitude towards Congressional authority in maritime issues in *Miles, supra,* with that used in *Baldassaro:*

> Although the SAA does not contain an express discretionary function exception to its waiver of sovereign immunity, we recognize that the FTCA's [discretionary function] exception is "implicit in private suits brought against the United States Government under the Suits in Admiralty Act."

Baldassaro, 64 F.3d at 208, citing *Wiggins, supra,* at 966. This comparison reveals the conflict that the *Baldassaro* decision creates with this Court's recent instruction on statutory reliance in *Miles,* and the Fourth Circuit decision in *Lane.*

It is quite commonly observed that one of the goals of admiralty law is uniformity. *See* Thomas J. Schoenbaum, *Admiralty and Maritime Law,* § 1-2 (2d Ed. 1994). The goals of uniformity have been achieved, as *Miles* and its progeny demonstrate, by limiting a seaman's recovery of damages to those provided for in federal statutes like the Jones Act and DOHSA. Courts, therefore, have had to disregard the more expansive remedies provided for under the judicially created maritime law and limit recovery that is provided by the exact wording of the statute at issue.

The decision below, however, strikes at the very heart of the uniformity which admiralty law has worked so hard to achieve. By not imposing similar standards on the United States of America in its capacity as a private employer under the Suits in Admiralty Act, the Fifth Circuit has created an egregious double standard to the prejudice of injured seamen like Mr. Baldassaro. The Fifth Circuit's abandonment of reverence for the strict construction of maritime statutes espoused in *Miles* stands as stark inequity to seamen, who have traditionally received great protection from courts sitting in admiralty. Should this Court avoid the present conflicts on this issue, the lower courts will continue to diverge, resulting in contrasting protections for the United States as well as Jones Act Seamen.

II. THE FIFTH CIRCUIT HAS PERPETUATED A CONFLICT IN THE CIRCUITS AND HAS FAILED TO FOLLOW THIS COURT'S POSITION ON A SEAMAN'S RIGHT TO ADEQUATE MAINTENANCE.

The obligation of a shipowner to care for seamen if they are injured or become ill during the voyage is of ancient vintage. This duty first appears in the sea codes that developed in the Middle Ages. In fact, the present form of maintenance and cure is not significantly different from that found in the ancient sea codes. "Maintenance" is the right of a seaman to food and lodging if he falls ill or becomes injured while in service of the ship. *Calmar S.S. Corp. v. Taylor,* 303 U.S. 525, 527, 58 S.Ct. 551, 82 L.Ed. 993 (1938). "Cure is the right to necessary medical services. *The Bouker No. 2,* 241 F. 831 (2nd Cir. 1917).

Maintenance is intended to cover the reasonable costs the seaman incurs in acquiring food and lodging ashore until the seaman recovers or reaches maximum cure. The rate at which maintenance is to be paid ordinarily reflects the cost of food and lodging in a particular area, comparable to that received on board the vessel. *Castro v. M/V Ambassador,* 657 F.Supp. 886, 887 (E.D. La. 1987); *Tate v. American Tugs, Inc.,* 634 F.2d 869 (5th Cir. 1981), *Caufield v. AC & D Marine, Inc.,* 633 F.2d 1129 (5th Cir. 1981), *Robinson v. Plimsoll Marine, Inc.,* 460 F.Supp. 949 (E.D. La. 1978).

Maintenance payments are intended to provide the seaman food and lodging comparable to that which would have been received aboard the ship. *Calmar S.S. Corp., supra.* The amount of maintenance to be paid in a given case is determined by the trier of fact based on "competent, probative evidence" put before it. *Grove v. Dixie Carriers,* 553 F.Supp. 777, 778 (E.D.La. 1982). A standard rate of $8.00 per day was judicially established in the 1950s. The reason for selecting the $8.00 figure is unclear, but its widespread acceptance after World War II was "presumably the product of habit, custom, and convenience." *Barnes v. Apex Marine Corp.,* 1989 Lexis 8572 (E.D.Pa. 1989). In order to grant maintenance in a timely manner, courts awarded a pre-determined amount rather than hearing evidence on a seaman's actual expenses for food and lodging in a particular area. *Id.*

With the advent of collective bargaining agreements in the 1960s, the $8.00 daily rate became customary in contracts between seaman's unions and shipowners. *See* Grant Gilmore & Charles L. Black, Jr., *The Law of Admiralty,* § 6-6 at 282-283 (1993). The customary rate has thus prevailed for nearly forty years, despite a constantly increasing cost

of living.

Maintenance is a strict liability remedy. A seaman need not prove that his illness or injury was caused by the fault or negligence of the shipowner. *The Osceola,* 189 U.S. 158, 23 S.Ct. 483, 47 L.Ed. 760 (1903). There have been questions raised as to whether the right to maintenance is incident to employment or whether that right is contractual in nature. Although this Court has, at times, used language normally associated with contract to describe the right, this Court has stressed that maintenance "differs from rights normally classified as contractual." *Vaughn v. Atkinson,* 369 U.S. 527, 82 S.Ct. 997, 8 L.Ed. 88 (1962).

In referring to the duty of maintenance and cure, this Court stated, "Contractual it is in the sense that it has its source in a relation which is contractual in origin, but given the relation, no agreement is competent to abrogate the incident." *Cortes v. Baltimore Insular Line,* 287 U.S. 367, 371, 53 S.Ct. 173, 77 L.Ed. 368 (1932). In fact, one court has recently held that the obligation to pay maintenance exists regardless of any employment contract, including a collective bargaining agreement. *Blainey v. American S.S. Co.,* 990 F.2d 885, 887 (6th Cir. 1990), *cert. denied,* ____U.S.____, 114 S.Ct. 246, 126 L.Ed. 2d 311 (1993).

Most often, courts have described maintenance as an incident to employment or a right annexed to the employment contract. *Barnes v. Andover Company, L.P.,* 900 F.2d 630 (3rd Cir. 1990); *See also Vaughn,* 369 U.S. at 532; *O'Donnell v. Great Lakes Dredge & Dock Co.,* 318 U.S. 36, 63 S.Ct. 488, 87 L.Ed. 596 (1943). The duty to provide maintenance attaches once the seaman enters the service of the ship, and

it is "a duty that no private agreement is competent to abrogate." *De Zon v. American President Lines,* 318 U.S. 660, 63 S.Ct. 814, 87 L.Ed. 1065 (1943).

It is the original protective purpose of maintenance and cure that is the basis for holding that the right is imposed by law and cannot be abrogated by the parties:

> The right... was not founded on a "meeting of the minds"- it was inexorably by ancient and established maritime *law* to every seaman's contract of employment. The parties had no choice in the matter. It was a duty superimposed by *law* coincidental with the formation of the contractual relation. The seaman could not contract against it— his or his employer's will is powerless to destroy it. This aspect alone reflects the true nature of the right... It is a right which the maritime law, in the wisdom of experience, found necessary and just, for the complete protection of seamen, whom maritime law has treated as "wards of the admiralty". (Emphasis original).

Dryden v. Ocean Accident & Guar. Corp., 138 F.2d 291, 293 (7th Cir. 1943). In interpreting the extent of the right to maintenance and cure, courts have been guided by the "broad and beneficial purposes" underlying the remedy. *Gillikin v. United States,* 764 F.Supp. 261, 264-265 (E.D. N.Y. 1991) (quoting *Aguilar v. Standard Oil Co.,* 318 U.S. 724, 735, 63 S.Ct. 930, 87 L.Ed. 1107 (1943)).

In *Barnes,* the Third Circuit was faced with the same problem of providing adequate maintenance notwithstanding a restrictive contract limiting the maintenance amount. A

seaman received a daily $8.00 rate of maintenance which was fixed in his collective bargaining agreement between the seaman's union and the shipowner. Because the amount was inordinately low, the Court held that the rate of maintenance was not binding on the seaman, who could seek maintenance at a rate based on expenses actually incurred.

Defendant in *Barnes* argued that the scant $8.00 per day rate was enforceable because maintenance and cure is a contractual obligation subject to negotiation. The Court, citing *De Zon, supra,* pointed out that the shipowner cannot contract with an individual seaman to abrogate maintenance completely, Defendant readily acknowledged that a union contract could not change the maintenance rate to $2.00 per day, for that would be an abrogation of the contract. The Court went on to state:

> We fail to see why retaining the 1952 rate of $8 a day when $8 a day in 1952 dollars would have a value of $33.24 in 1985... is not a comparable abrogation.

Barnes, 900 F.2d at 637.

In *Baldassaro,* the Fifth Circuit acknowledged that it had yet to address this issue. Instead of following this Court's lead in *De Zon, supra,* and the most recent decision by a circuit court in *Barnes,* the Fifth Circuit deferred to an earlier opinion rendered by the Ninth Circuit to reject Petitioner's claim. The more logical progression from *De Zon* through *Barnes* is to recognize that a private agreement which contains an $8.00 per day maintenance rate, despite any competing policy considerations, abrogates a seaman's daily allowance for food and lodging while recovering from injury.

Historically, the Fifth Circuit and the courts within have expressed deep concern over the meager daily rate at which maintenance benefits are paid. Indeed, the Fifth Circuit has established the minimum maintenance rate for non-union seamen in New Orleans to be $15 per day. *Caufield, supra.* See also *Morel v. Sabine Towing & Transp. Co.,* 669 F.2d 345 (5th Cir. 1982). In *Ballenger v. Bayship Management Corp.,* 1993 A.M.C. 2239 (E.D. La. 1993), the court took judicial notice that "$8.00 per day appears to be insufficient to meet daily living expenses in 1993." Furthermore, courts have deemed the $8.00 per day maintenance benefit a "starvation payment." *Harper v. Zapata Off-Shore Co.,* 563 F.Supp. 576, 582 (E.D. La. 1983), *rev'd on other grounds,* 741 F.2d 87 (5th Cir. 1984).

In *Grove v. Dixie Carriers, Inc., supra,* at 780, the court stated that "[T]here is some point of reasonableness which cannot be exceeded in setting the contractual rate of maintenance and which would be tantamount to abrogating the obligation to pay maintenance and cure entirely." The argument that $8.00 per day is enough to pay the food, utilities and rent for a seaman in 1995 is completely unrealistic and flies in the face of economic reality. The Grove court noted that $8.00 per day in 1952 dollars was worh $33.24. Accounting for a continued rate of inflation, that rate in 1995 dollars is worth $44.45 per day.

Despite the Fifth Circuit's knowledge of the insufficiency of an $8.00 per day rate of maintenance, it has chosen to avoid the clear pronouncement by this Court in *De Zon* that no private agreement is competent to abrogate a seaman's ancient right to such benefits. As is also evident, the *Baldassaro* decision is in direct conflict with the position

firmly established in *Barnes v. Andover, supra.* A review of this issue will enable the Circuit Courts and the District Courts to comprehend this Court's position established in *De Zon, supra,* and resolve the conflicts created therein.

CONCLUSION

The plain language of the Suits in Admiralty Act does not include an express discretionary function exception to the United States' waiver of sovereign immunity.This Court has expressed the view that maritime law is now dominated by federal statute. Courts overstep their bounds of constitutional authority by expanding remedies within statutes where clearly none are provided for in the statute. Similarly, the Fifth Circuit must refrain from expanding a defendant's defenses where the statute does not explicitly furnish one. The decision of the Fifth Circuit below maintains a conflict in the circuits and flies in the face of this Court's recent pronouncement on judicial limitations on maritime statutory interpretation when the language of the statute is clear on its face. Because the Suits in Admiraly Act speaks clearly, the Fifth Circuit's inquiry should have finished there.

Furthermore, an $8.00 per day maintenance rate is so low as to constitute an abrogation of a seaman's ancient right to maintenance. Such a meager sum is inadequate to provide a seaman with that which maintenance benefits guarantee, the kind of food and lodging which is provided aboard ship. The decision of the Fifth Circuit below perpetuates a conflict in the circuits and prevents a seaman from obtaining adequate benefits to which he is guaranteed under maritime law.

This Court has previously upheld the separation of powers doctrine in *Miles* prohibiting courts from acting as superlegislatures. Because of divergent decisions within the circuits on the two stated issues, only this Court can resolve the conflict and restore the uniformity so desperately sought in the Admiralty Law. In addition, in these times of depleting

private vessel availability, the United States reserve fleet is being relied upon more and more. The use of the United States vessels will certainly result in more litigation on these issues, with injured seamen choosing the most advantageous forum to resolve their claims. Baldassaro therefore seeks relief from this Court by requesting that the present Writ of Certiorari be granted.

Respectfully Submitted,

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APPENDIX A

Dennis J. BALDASSARO,
Plantiff-Appellant,

v.

UNITED STATES of America,
Defendant-Appellee.

No. 94-30605.

United States Court of Appeals,
Fifth Circuit.

Sept. 15, 1995.

Seaman who was injured aboard government vessel when part of detachable sea rail separated from his bunk, causing him to fall to deck, brought suit against the United States pursuant to the War Shipping Administration Act and the Suits in Admiralty Act (SAA), alleging negligence in failing to secure railing. Seaman also claimed that daily maintenance benefit of $8 stipulated in collective bargaining agreement (CBA) was insufficient to providing food and lodging comparable to that aboard ship. The United States District Court for the Eastern District of Louisiana, Edith Brown Clement, J., granted summary judgment in favor of government, and seaman appealed. The Court of Appeals, Wiener, Circuit Judge, held that: (1) discretionary function exception of the Federal Tort Claims Act (FTCA) barred negligence claim against the government, and (2) seaman was

bound by daily maintenance rate set in CBA, where there was no allegation that CBA as a whole was unfair or that seaman was not adequately represented by union.

Affirmed.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before REAVLEY, KING and WIENER, Circuit Judges.

WIENER, Circuit Judge:

Plaintiff-Appellant Dennis J. Baldassaro appeals a district court order granting summary judgment in favor of Defendant-Appellee the United States of America, dismissing Baldassaro's maritime personal injury action on the ground that the "discretionary function exception" bars his negligence claim against the United States. Baldassaro also appeals the district court's amended judgment to the extent that it rejects his contention that the United States should pay him more than the $8.00 daily maintenance benefit stipulated in his Union's collective bargaining agreement (CBA). Finding no reversible error in either ruling, we affirm.

FACTS AND PROCEEDINGS

As a Jones Act seaman and member of the Seafarer's International Union, Baldassaro sued his employer, the United States of America, for injuries sustained while working aboard the Cape Carthage, a vessel assigned to the Ready

Reserve Force (RRF) component of the National Defense Reserve Fleet (Fleet). While climbing into his upper bunk in the summer of 1991, Baldassaro fell to the deck when the part of the detachable sea rail located at the foot of his bunk separated from the bunk. Baldassaro filed suit against the United States pursuant to the War Shipping Administration Act[1] and the Suits in Admiralty Act (SAA),[2] alleging negligence in failing to secure the railing. He also claimed that the daily maintenance benefit of $8.00 stipulated in his CBA and paid to him while he was unable to work was insufficient to fulfill its purpose of providing a seaman with food and lodging comparable to that aboard ship.

The district court granted summary judgment for the United States, concluding that, as the decision to place the Cape Carthage in the RRF was a "discretionary function" within the scope of the discretionary function exception, the United States was immune from suit. Subsequently, the district court amended its judgment to uphold the $8.00 daily maintenance benefit.

II

ANALYSIS

A. STANDARD OF REVIEW

We review a grant of summary judgment using the same standards that guide the district court.[3] Summary

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[1] 50 U.S.C. app. § 1291 (1981).

[2] 46 U.S.C. app. § 741-52 (1987).

[3] *Walker v. Sears, Roebuck & Co.*, 853 F.2d 355, 358 (5th Cir. 1988).

judgment is appropriate when no issue of material fact exists and the movant is entitled to judgment as a matter of law.[4] Questions of law are reviewed de novo.[5]

B. DISCRETIONARY FUNCTION EXCEPTION

Baldassaro first contends that the district court improperly dismissed his claim based on the discretionary function doctrine. Baldassaro maintains that the United States' decision to equip the bunks on the Cape Carathage with detachable sea rails is not a discretionary function immune from judicial scrutiny, as the design decisions regarding the bunks and sea rails were not based on policy considerations. Baldassaro asserts that the United States has advanced no legitimate social, economic, or political policies that guided its decision to equip the bunks on the Cape Carthage with detachable sea rails. And he insists that the only applicable consideration—safety—is an inappropriate basis on which to apply the discretionary function exception.

[1] The discretionary function exception is set forth in the Federal Tort Claims Act (FTCA). It limits the United States' waiver of sovereign immunity under the Act by providing that the waiver will not apply to:

> [a]ny claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exer-

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[4] *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986).

[5] *Walker*, 853 F.2d at 358.

> cise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.[6]

Although the SAA does not contain an express discretionary function exception to its waiver of sovereign immunity, we recognize that the FTCA's exception is "implicit in private suits brought against the United States Government under the Suits in Admiralty Act."[7]

[2] The exception covers only acts that " 'involv[e] an element of judgment or choice;' "[8] thus " 'it is the nature of the conduct, rather than the status of the actor,' that governs whether the exception applies."[9] As the purpose of the exception is to " 'prevent judicial "second guessing" of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort.' "[10] it " 'protects only governmental actions and decisions based on considerations of public

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[6] 28 U.S.C. § 2680(a) (1990).

[7] *Wiggins v. United States Through Dept. of Army*, 799 F.2d 962, 966 (5th Cir. 1986).

[8] *United States v. Gaubert*, 499 U.S. 315, 322, 111 S.Ct. 1267, 1273, 113 L.Ed.2d 335 (1991) (citing *Berkovitz v. United States*, 486 U.S. 531, 536, 108 S.Ct. 1954, 1958, 100 L.Ed.2d 531 (1988)).

[9] *Id.* (citing *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 813, 104 S.Ct. 2755, 2764, 81 L.Ed.2d 660 (1984), *reh'g denied* 468 U.S. 1226, 105 S. Ct. 26, 82 L.Ed.2d 919 (1984)).

[10] *Id.* at 323, 111 S.Ct. at 1273 (citing *Varig Airlines*, 467 U.S. at 814, 104 S.Ct. at 2765).

policy.' "[11]

Recently, in *United States v. Gaubert*,[12] the Supreme Court held that, "when established governmental policy, as expressed or implied by statute, regulation, or agency guidelines, allows a Government agent to exercise discretion, it must be presumed that the agent's acts are grounded in policy when exercising that discretion."[13] The Court determined that, in light of this presumption, to survive a motion to dismiss based on the discretionary function exception a complaint "must allege facts which would support a finding that the challenged actions are not the kind of conduct that can be said to be grounded in the policy of the regulatory regime."[14] The Court noted that, in determining whether the discretionary function exception bars a suit against the government, the focus of the inquiry is on the nature of the action taken and on whether that action is susceptible to policy analysis.[15]

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[11] *Id.* at 323, 111 S.Ct. at 1273; *Berkovitz*, 486 U.S. at 536-537, 108 S.Ct.at 1958-1959 (principles guiding application of discretionary function exception include whether action is matter of choice for acting employee and whether judgment is of kind that discretionary function exception was designed to shield).

[12] 499 U.S. 315, 111 S.Ct. 1267, 113 L.Ed.2d 335 (1991).

[13] *Id.* at 324, 111 S.Ct. at 1274 ("[I]f a regulation allows the employee discretion, the very existence of the regulation creates a strong presumption that a discretionary act authorized by the regulation involves consideration of the same policies which led to the promulgation of the regulations.")

[14] *Id.* at 324-25, 111 S.Ct. at 1274-1275.

[15] *Id. See ALX El Dorado, Inc. v. Southwest Sav. & Loan Ass'n/FSLIC*, 36 F.3d 409, 411-12 (5th Cir.1994) (emphasizing *Gaubert* presumption and concluding that complainant failed to allege that statutory discretion exercised by banking agency was not based on considerations of public policy);

1. *NATURE OF THE DECISION*

The Fleet was established by Section 22 of the Merchant Ship Sales Act of 1946 to serve as a reserve fleet that could be activated to meet the United States' shipping requirements during national emergencies.[16] The Fleet and its RRF component consist of "*those vessels* owned or acquired by the United States Government that the Secretary of Transportation, after consultation with the Secretary of the Navy, *determines* are of value for national defense purposes and that the Secretary of Transportation *decides* to place and maintain in the fleet."[17] Clearly, as is reflected in the language of the statute, the Merchant Ship Sales Act authorizes and requires the Secretary of Transportaton to exercise his discretion in determining which vessels are to be included in the Fleet and its RRF component. Consequent-

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footnote 15 continued

State of La. v. Public Investors, Inc., 35 F.3d 216, 220-21 (5th Cir.1994) ("There is a presumption that when government employees exercise discretion given to them by a statute or regulation, they are doing so based on the same policy concerns that animate the controlling statute or regulation itself.").

[16] 50 U.S.C. app. § 1744 (1995). *See also* 50 U.S.C. app. § 1735(a) (1981) (declaration of policy for Merchant Ship Sales Act of 1946)

> (a) It is necessary for the national security and development and maintenance of the domestic and the export and import foreign commerce of the United States that the United States have an efficient and adequate American-owned merchant marine ... capable of serving as a naval and military auxilary in time of war ... composed of the best-equipped, safest, and most suitable types of vessels ...

Id.

[17] 50 U.S.C. app. § 1744(a) (1995) (emphasis added). The administration and operation of the RRF is governed by an agreement between the United States Navy and the Maritime Administration (MARAD).

ly, as the act of selecting or approving a particular ship for the Fleet or the RRF involves an element of judgment or choice, that act, standing alone, satisfies the first prong of the discretionary function exception standard.

Taking our analysis a step further and focusing on the act of equipping the bunks on the Cape Carthage with detachable sea rails, we note first that there are no statutes, regulations, policies, guidelines, or Maritime Administration (MARAD) standards that require sea rails to be attached permanently to the bunks on RRF vessels.[18] As there were no such specifications, it follows that the decisions regarding the design of the Cape Carthage's bunks and sea rails were within the discretion of the United States. Second, although unnecessary in light of the absence of a statutory mandate requiring permanently attached sea rails, our review of the history of the Cape Carthage further convinces us that the design for the bunks on board the vessel was a discretionary act for purposes of the exception.

The Cape Carthage was constructed in the 1960's by Lykes Brothers Steamship Company, Inc. (Lykes) under the Title V Construction Subsidy Program.[19] The subsidy program was enacted to (1) encourage ship owners to have their ships built by American labor and (2) ensure that the United States had an adequate merchant marine in times of national emergency. Eligibility under the program rquired Lykes to develop and construct a ship that satisfied MARAD stand-

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[18] *See, e.g.*, Coast Guard Dept. of Transp.—Accommodations for Officers and Crew, 46 CFR Sub. Ch. 1 § 92.20-20 (1990) (listing requirements for sleeping accommodations for officers and crew).

[19] *See* 46 U.S.C. app. § 1151 et seq. (1987).

ards. Lykes submitted specifications to build a C3-S-37c, the standard for a combination bulk and general cargo ship. This particular design included specifications for crew furniture that complied with the MARAD's furniture design standards, which were contained in two books of drawings of different designs of crew furniture.

Although the MARAD standards depicted bunk beds with detachable sea rails, ship-builders were not requird to build exact replicas of those designs. Shipbuilders could have submitted—and MARAD could have approved—designs that were "equal" to the MARAD standards, including bunks designed with permanently attached sea rails. In fact, at the time the Cape Carthage was built, there was a different bunk design that specified a very shallow bed pan that housed the mattress and required permanently attached sea rails. Ev en though this bunk design was considered too new and too expensive in the 1960's, it was both an option that the ship-builder could have included in its specifications and an alternative design that MARAD would have approved. The record reveals, however, that detachable sea rails were—and still are—the standard in most United States and foreign ships; and even though these rails can be used as hand rails, they are installed primarily to protect the occupant from rolling and sliding out of the bunk during heavy weather.

Adhering to customary practice, Lykes submitted—and MARAD approved—plans to equip the Cape Carthage with detachable sea rails. In 1984, after conducting a joint survey of the Cape Carthage to ensure that it met MARAD's standards and was suitable for the Department of Defense's purposes, MARAD purchased the vessel from Lykes and assigned it to the RRF. As the decision to equip the vessel with

detachable rails was optional—albeit standard practice and in compliance with MARAD's general standards—it follows that the decision was in fact a discretionary act.

2. *Policy Analysis*

Having concluded that the decision to equip the Cape Carthage with detachable sea rails was a discretionary act. Our next inquiry is whether that decision was based on considerations of public policy. Baldassaro contends that the discretionary function exception does not apply in any given situation unless the discretionary act is one that was actually balanced against social, economic, and political concerns. He maintains that this balancing process is a *necessary prerequisite* in applying the exception and argues that in this instance the government has not advanced any theory which even remotely relates to a social, economic, or political policy. We are convinced that Baldassaro mis-apprehends the discretionary function exception and the Supreme Court's recent decision permitting a presumption of policy.

Baldassaro relies in part on *Moyer v. Martin Marietta Corporation*,[20] in which we held that the discretionary function exception did not apply to a particular design for an ejection seat in a military aircraft. We recognized that the exception would apply to both the selection of the aircraft and the number of aircraft to be purchased, but refused to extend the exception to immunize the government's acceptance of a system of the aircraft.[21] We distinguish *Moyer*,

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[20] 481 F.2d 585 (5th Cir. 1973).

[21] *Id.* at 598.

not on its facts, but on the jurisprudence that has evolved during the twenty-two years that have elapsed since that opinion was written. It was decided in 1973, long before the Supreme Court expressed its willingness to presume that the discretionary acts flowing from a policy-based statute are grounded in the same policy considerations that underlie the statute. For the reasons expressed, we are satisfied that, in light of post-*Moyer* developments, the discretionary function exception *does* extend to the discretionary act of design reviewed today.

Baldassaro distinguishes *Gordon v. Lykes Brothers Steamship Company, Incorporated,*[22] in which we held that the government's decision to build and use ships with asbestos at a time of war and subsequent to that war was protected by the discretionary function exception. He reasons that, despite the fact that the Cape Carthage was activated during Operation Desert Storm in 1990, the policy considerations inherent in acquiring military vessels at a time of war did not exist when the Cape Carthage was purchased in 1984. While we agree with that factual distinction, we note that in *Gordon* we observed—and apparently were influenced by—the fact that, as here, the government had provided historical evidence that the its action was consistent with its policy and its existing standard design.[23] Even if the facts of*Gordon* can be distinguished from the facts of this case based on imminent and actual war-time conditions, we remain convinced that post-*Gordon* developments support our conclusion that the discretionary function exception does apply in this instance.

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[22] 835 F.2d 96 (5th Cir.), *cert. denied,* 488 U.S. 825, 109 S.Ct. 73, 102 L.Ed.2d 50 (1988).

[23] *Id.* at 100.

Baldassaro also distinguishes *Boyle v. United Technologies Corporation,*[24] arguing that, in contrast to the nonexistent policy factors that underlie decisions regarding the design of bunks on RRF vessels, the design and decision making process for *military equipment,* i.e., a co-pilot emergency escape hatch system for a military helicopter, is clearly based on social, economic and political policy factors.[25] Again, for the reasons expressed, we are convinced that the government's design decisions in this instance are capable of being influenced by policy considerations.

[&3,4] The Supreme court's seminal decision in *United States v. Gaubert*[26] instructs that when established government policy allows a government agent to exercise discretion, it must be presumed that the agent's acts are grounded in policy when he exercises that discretion. As the Supreme Court noted, the appropriate inquiry is whether the act in question is "*susceptible to policy analysis.*"[27] We are satisfied that the MARAD ship design decisions for vessels of the RRF, including *inter alia* whether to install detachable sea rails on vessels such as the Cape Carthage, involve the weighing of competing policy considerations that the discretionary function exception protects from judicial scrutiny. Baldassaro disagrees, arguing that policy considerations such as expense, appearance, safety, comfort, practicability and

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[24] 487 U.S. 500, 108 S.Ct. 2510, 101 L.Ed.2d 442 (1988).

[25] *See id.* 511, 108 S.Ct. at 2518 ("[T]he selecton of the appropriate design for military equipment to be used by our Armed Forces is assuredly a discretionary function within the meaning of [the exception].").

[26] 499 U.S. 315, 111 S.Ct. 1267, 113 L.Ed.2d 335 (1991).

[27] *Id.* at 325, 111 S.Ct. at 1275.

function are not social, economic, or political considerations of a governmental nature. As we observed above, however, the declaration of policy for the act authorizing the RRF states that it is necessary for national security to have an efficient and adequate merchant marine composed of the best-equipped, safest, and most suitable vessels.[28] Certainly this stated policy encompasses the considerations espoused by the government, and casts these considerations in a light distinguishable from those of an ordinary purchaser.

The decision to use detachable sea rails was but one of myriad details that added up to the total ship design eventually approved by MARAD as an exercise of its discretion in selecting vessels that it determined were of value for national defense. We venture that almost any exercisse of governmental discretion could be overly parsed so as to focus on minute details of sub-decisions to the point that any relationship to policy would appear too attenuated. But doing that obscures the very purpose of the discretionary function exception. Clearly, that purpose is to prevent judicial "second-guessing"[29] of decisions arising from and grounded in policy. We are neither in a position—nor do we desire to be—to dissect and second-guess each discreet aspect of a total design package that is grounded in policy considerations pertaining to national defense. Indeed, such tunnel-visioned analyses would render the discretionary function exception nugatory and open virtually every decision that implements a governmental policy to liability under some waiver of sovereign immunity.

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28 *See infra* n. 16.

29. *Gaubert*, 499 U.S. at 323, 111 S.Ct.at 1273.

More precisely, the burden is on Baldassaro to allege facts that would support a finding that the challenged action is not the kind of conduct that can be said to be grounded in the policy of the regulatory regime.[30] Baldassaro conclusionally asserts that the government's decision regarding the design of the sea rails was not rooted in any social, economic, or political policies. What he has failed to do, however, is to present specific facts sufficient to rebut the presumption that the particular design decision was grounded in the same policy considerations that underlie the statute authorizing the United States to exercise its discretion in determining which vessels are of value for national defense. Consequently, his challenge of the district court's summary judgment dismissal based on the discretionary function exception cannot succeed.

C. MAINTENANCE BENEFIT

[5] Baldassaro also contends that the daily maintenance benefit, consisting of $8 a day during the time he was unable to work, was insufficient. The duty to provide maintenance attaches once the seaman enters the service of the ship and it is "a duty that no private agreement is competent to abrogate."[31] The rate at which maintenance is to be paid is supposed to reflect the cost of food and lodging in a particular area, comparable to that received on board the

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[30] *Id.* at 324-25, 111 S.Ct. at 1274-75.

[31] *De Zon v. American President Lines*, 318 U.S. 660, 667, 63 S.Ct. 814, 818, 87 L.Ed. 1065 (1943), *reh. denied*, 319 U.S. 780, 63 S.Ct. 1025, 87 L.Ed. 1725 (1943).

vessel.[32] The right to maintenance cannot be abrogated, but it can be modified and defined by contract. "[T]here is a fundamental difference between contractual regulation of the rate of maintenance payments and contractual elimination of such payments altogether."[33] Baldassaro claims that $8.00 a day is unreasonable and so insufficient as to abrogate his right to maintenance.

[6] In a similar case the Third Circuit accepted the argument made by Baldassaro in this case and concluded that a seaman is not bound by a maintenance rate set in a CBA if he can show higher daily expenses.[34] The court relied on the principle announced in *De Zon*, indicating that a maintenance rate could be so low as to abrogate it, and the court relied on its conclusion that the labor laws do not preempt the traditional doctrine of maintenance rights. The court therefore concluded that the traditional doctrine allowing for maintenance could require a court to ignore the terms of a CBA.[35]

Three other circuits have rejected this rationale and held that the CBA or contract controls.[36] This Circuit has not addressed this issue. We have awarded higher maintenance rates to seamen when there was no union

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[32] *Tate v. American Tugs, Inc.* 634 F.2d 869, 870 (5th Cir.1981).

[33] *Dowdle v. Offshore Express, Inc.*, 809 F.2d 259, 263-64 (5th Cir.1987).

[34] *Barnes v. Andover Co., L.P.*, 900 F.2d 630, 640 (3rd Cir.1990).

[35] *Id.*

[36] *See Al-Zawkari v. American S.S. Co.*, 871 F.2d 585 (6th Cir.1989) (upholding $8.00/day maintenance rate); *Macedo v. F/V Paul and Michelle,*

contract.[37]

We agree with the First, Sixth and Ninth Circuits. As the Ninth Circuit noted in *Gardiner*, "Congress viewed collective bargaining as a key instrument in its effort to promote industrial peace ... [T]his court will not lightly embrace the repudiation of contractual obligations enumerated in a collective bargaining agreement and will 'choose the rule that will promote the enforcement of collective bargaining agreements.' "[38] As in *Gardiner*, there is no allegation in this case that the CBA as a whole is unfair or that this seaman was not adequately represented by the Union. "The adequacy of the maintenance rate should not be examined in isolation by the cout because the determination of its adequacy in relation to the whole scheme of benefits has already been made by the union and the seamen who voted for the contract."[39]

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footnote 36 continued

868 F.2d 519 (1st cir.1989) (upholding $10.00/day maintenance rate); *Gardiner v. Sea-Land Serv., Inc.*, 786 F.2d 943 (9th Cir.) (upholding $8.00/day maintenance rate), *cert. denied*, 479 U.S. 924, 107 S.Ct. 331, 93 L.Ed.2d 303 (1986).

[37] *See e.g., Morel v. Sabine Towing & Transp. Co., Inc.*, 669 F.2d 345 (5th Cir.1982) ($20.00/day awarded); *Caulfield v. AC & D Marine, Inc.*, 633 F.2d 1129 (5th Cir.1981) (non-union seaman. $15.00/day awarded).

[38] *Gardiner*, 786 F.2d at 948 (citation omitted).

[39] *Id.* at 949.

In conclusion, we affirm the district court's dismissal of Baldassaro's negligence claim as barred by the discretionary function exception, and the court's amended judgment with respect to Baldassaro's maintenance claim.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

FILED
AUG 31 '94

DENNIS J. BALDASSARO	*	CIVIL ACTION
VERSUS	*	NO. 93-1871
UNITED STATES OF AMERICA	*	SECTION "N"

ORDER AND REASONS

The United States of America's motion for summary judgment was decided this date on memoranda. For the reasons set forth below, the United States' motion is GRANTED.

I. BACKGROUND

Dennis Baldassaro was employed as a fireman/watertender aboard the CAPE CARTHAGE on July 14, 1991. On that date, Baldassaro was allegedly injured while climbing into his bunk. Baldassaro contends that he "gripped a rail positioned at the foot of his upper bunk and attempted to ascent to his berth. When he reached the top of the bunk ladder, the rail slid out of its holes and caused Baldassaro to fall upon the metal deck floor below." *Pre-Trial*

DATE OF ENTRY Sep 1 1994

Order, at 3 (plaintiff's summary of the facts). Baldassaro filed this action claiming that his fall and the resulting injuries were caused by the negligence of his employer, the United States of America: "Specifically, the defendant was negligent in failing to secure a railing which can be used to gain access to the upper bunk." *Id.* Plaintiff has conceded that the bunk railing functioned as designed. That is, the bunk railing was designed to be removable.

The United States of America has filed a motion for summary judgment, contesting this Court's subject matter jurisdiction. Specifically, defendant avers that the design of the bunk was a discretionary function for which the United States has not waived its immunity. Plaintiff first argues that the discretionary function exception does not apply to his claim, which is based on the Suits in Admiralty Act, 46 U.S.C. § 741-52. Second, he contends that even if the exception is applicable to claims brought pursuant to the Suits in Admiralty Act, the exception is not applicable to his claim, in that the design of the bunk was not a discretionary function.

II. ANALYSIS

A. The Discretionary Function Exception

In all suit brought against the Government, the Court must begin its analysis with the premise that the United States, as sovereign, is immune from suit absent its consent. *See United States v. Mitchell*, 455 U.S. 535, 538 (1980); *United States v. Sherwood*, 312 U.S. 584, 586 (1941) ("The United States, as sovereign, is immune from suit save as it consents to be sued."); *see also United States v. Wiggins*, 799 F.2d 962, 965 (1986) ("It is of course, basic textbook law that

sovereign immunity is assumed and the waiver of sovereign immunity requires clear statutory expression.") Absent a congressional waiver of sovereign immunity, the courts are without jurisdiction to entertain any action against the United States. *Mitchell,* 445 U.S. at 538.

The Suits in Admiralty Act ("the Act") is a limited waiver of the United States Government's sovereign immunity. 46 U.S.C. § 745. The Act does not expressly except discretionary acts from this waiver of immunity, unlike the Federal Tort Claims Act,[1] 28 U.S.C. §§ 2671-80. Nonetheless, in *Wiggins v. United States,* 799 F.2d at 966, the Court of Appeals held that such an exception is "implicit in private suits brought against the United States Government under the Suits in Admiralty Act." The court reasoned that "[w]ithout the implication of a discretionary functions exception in the suits in Admiralty Act, every decision of a government official cognizable under the Act would be subject to a second-guessing by a court on the claim that the decision was negligent." *Id.* The discretionary function exception was crafted to avoid just that situation. *United States v. S.A. Empressa de Viacao Aerea Rio Grandense (Varig Airlines),* 467 U.S. 797, 810 (1984). Plaintiff argues that "since the United States Supreme Court has yet to apply the exception to the Suits in Admiralty Act . . . its exclusion in the Suits in Admiralty Act prohibits its application." This

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1 The Federal Tort Claims Act provides that sovereign immunity is not waived relative to:

> Any claim based upon . . . the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not such discretion involved be abused.

28 U.S.C. § 2680 (a). This limitation of the Act's waiver of sovereign immunity is known as the discretionary function exception.

Court is bound by the Fifth Circuit's holding in *Wiggings*.. The discretionary function exception, which is codified in the Federal Tort Claims Act, does limit the Suits in Admiralty Act's waiver of sovereign immunity.

Finding that the Suits in Admiralty Act is limited by the discretionary function exception does not end the inquiry. The next stage involves a determination of whether the exception applies to the challenged governmental conduct. In *United States v. Gaubert,* 111 S.Ct. 1267 (1991), the United States Supreme Court attempted to delineate the requirements of the discretionary function exception. The exception is not all encompassing. Rather, it excepts from the general waiver of sovereign immunity, contained in the Suits in Admiralty Act, only those acts that involve the exercise of discretion. *Id.* at 1273 ("The exception covers only acts that are discretionary in nature; acts that 'involv[e] an element of judgment or choice . . . ." (alteration in original)). In assessing whether the governmental conduct was discretionary, the focus is on the act and not the actor. That is, " 'it is the nature of the conduct, rather than the status of the actor," that governs whether the exception applies." *Id.* (quoting *Berkovitz v. United States,* 486 U.S. 531, 536 (1988)).

Decisions made at the "policy or planning" level are clearly protected by the exception. *Gaubert,* 111 S. Ct. at 1274 (holding that "there is no doubt that planning-level decisions . . . are protected by the discretionary function exception") *Fazi v. U.S.,* 935 F.2d 535, 537 (2d Cir. 1991). Thus, the "decisions as to whether or not to adopt regulations and as to the content of such regulations" are not a proper subject for judicial scrutiny. *Id.* Prior to the *Gaubert* decision, it was not clear whether or not decisions made at the operational, as

opposed to the planning, level were covered by the exception. In *Gaubert*, the Court made it clear that the discretionary function exception is not limited to policy-oriented decisions:

> In light of our cases and their interpretation of [the discretionary function exception], it is clear that the Court of Appeals erred in holding that the exception does not reach decisions made at the operational or management level . . . . A discretionary act is one that involves choice or judgment; there is nothing in that description that refers exclusively to policy making or planning functions. . . . Discretionary conduct is not confined to the policy or planning level.

Gaubert, 111 S. Ct. at 1275.

Despite that expansive language, it is clear that not all discretionary acts are covered by the exception. *Id.* at 1273 ("[E]ven 'assuming the challenged conduct involves an element of judgment,' it remains to be decided 'whether that judgment is of the kind that the discretionary function exception was designed to shield." Accordingly, once it is determined that the challenged action involved the exercise of discretion, the Court must determine whether the choice was of the kind and nature that is contemplated by the discretionary function exception. The discretionary function exception exists to prevent the judiciary from second guessing legislative and executive decisions, which were grounded in considerations of public policy. *Id.; see Variq Airlines*, 467 U.S. at 814. Accordingly, the exercise of discretion must be "based on considerations of public policy" to come within the exception. *Berkovitz*, 486 U.S. at 537. In the context of day-

to-day decisions, the "applicability of the discretionary function exception depends largely on whether or not the regulation specifically 'mandates particular conduct.' " *Fazi,* 935 F.2d at 538.

When a government agent fails to comply with the dictates of a mandatory statute or regulation, the discretionary function exception is not applicable and the federal government's sovereign immunity is waived. *Gaubert,* 111 S. Ct. at 1274 ("If the employee violates the mandatory regulation, there will be no shelter from liability because there is no room for choice . . . . ").

In contrast, when an employee acts in accordance with a mandatory regulation, the result is different. The employee still has no discretion to act in any manner other than that prescribed by statute. The focus of the court's analysis should shift to the decision to adopt the regulation, which is a discretionary function. *Id.; Fazi,* 935 F.2d at 537. The government agent's actions taken in accordance with the regulation will be immune from challenge also, because "the action will be deemed in furtherance of the policies which led to the promulgation of the regulation." *Gaubert,* 111 S. Ct. at 1274. To hold otherwise would be irrational. If the decision to adopt a regulation is to be immune from scrutiny by the judiciary, then all of the actions necessary to implement it must be immune as well.

If the applicable regulations do not mandate a particular course of conduct, thus allowing the employee to exercise discretion, "the very existence of the regulation creates a strong presumption that a discretionary act authorized by the regulation involves consideration of the same policies

which led to the promulgation of the regulations." *Id.* ("it must be presumed that the agent's acts are grounded in policy when exercising that discretion").

The *Gaubert* Court recognized that there will be situations when the agency will not have issued comprehensive regulations covering all actions by its agents. The absence of such specific regulations is not fatal to the Government's claim of immunity. The court must also look to the statute governing the conduct. *Id.* From that examination, the Court should determine "the general aims and policies of the controlling statute." *Id.* In order for plaintiff's complaint to withstand the Government's claim of sovereign immunity, "it must allege facts which would support a finding that the challenged actions are not the kind of conduct that can be said to be grounded in the policy of the regulatory regime. *Id.* at 1275. The focus of this inquiry is on "the nature of the actions taken and on whether they are susceptible to policy analysis," not on "the agent's subjective intent in exercising the discretion. *Id.*

B. Application of the Exception to Plaintiff's Claim

In this case, plaintiff contends that the United States, as his Jones Act employer, was negligent in failing to require that the bunk railings on the CAPE CARTHAGE be fixed and not removable. Although plaintiff refuses to concede that his complaint is based on an alleged design defect, there is no dispute that the bunk railings were designed to be removable. Furthermore, it is clear that the railing functioned in accordance with its design when the plaintiff was injured. In other words, the railing was not "broken." Plaintiff disputes the Government's assertion that the "railing

. . . did not break on the night of the alleged injury." United States' Statement of Undisputed Material Facts at ¶4. He contends that "the bunk failed to operate properly under normal circumstances." It is apparent that the plaintiff is contending that the bunk did not operate in a "safe manner." Since he has presented no evidence that the bunk was intended to operate in what he contends would have been a "safe manner," he must be challenging the design of the bunk.

It is the design that the United States contends is immune from judicial review. The United States essentially contends that the applicable statutes and regulations give the United States Maritime Administration ("MARAD") the discretion to specify the design of the CAPE CARTHAGE and that the exercise of that discretion is the kind of judgment that the discretionary function exception covers.

The vessel in question is part of the National Defense Reserve Fleet, which was enacted as part of the Merchant Ship Sales Act of 1946, codified at 50 U.S.C. App. § 1744. Pursuant to the Act, the Secretary of Transportation is required to maintain a fleet of government-owned vessels that "are of value for national defense." *Id.* at § 1744 (a). The statute authorizes the "Secretary of the Transportation, after consultation with the Secretary of the Navy" to determine which vessels are appropriate for inclusion in the National Defense Reserve Fleet. *Id.* The statute unquestionably allows the Secretary of Transportation to exercise discretion in acquiring and maintaining the fleet.

The delegation of authority is apparent on the face of the statute:

> The Secretary of Transportation shall maintain a National Defense Reserve Fleet, including any vessel assigned by the Secretary to the Ready Reserve Force component of the Fleet, consisting of those vessels or acquired by the United States Government that the Secretary of Transportation, after consultation with the Secretary of the Navy, determines are of value for national defense purposes and that the Secretary of Transportation decides to place and maintain in the fleet.

50 U.S.C. App. § 1744 (a). Although the secretary of Transportation has no discretion to determine whether to maintain the fleet, the foregoing language makes it absolutely clear that the determination of which vessels to place in the fleet is a matter left entirely to the best judgment of the Secrtary of Transportation.

In exercising this discretion, the Secretary of Transportation[2] has promulgated policies and regulations detailing the design specifications for vessels in the National Defense Reserve Fleet. None of these regulations require a bunk railing to be nonremovable. In other words, there was no mandate that bunk railings be fixed. The Secretary of Transportation and, thus, MARAD[3] had discretion to decide whether the bunk railings should have been fixed. Plaintiff does not contend that the applicable statutes and regulations

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[2] The Maritime Administration is the administrative body that actually maintains and operates the National Defense Reserve Fleet. MARAD is an office within the Department of Transportation.

[3] In those instances in which the Secretary of Transportation had discretion to decide the best course of conduct, "[i]t necessarily follows that acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable." *Dalehite*, 346 U.S. at 35-36.

banned removable bunk railings.

The first requirement for the application of the discretionary function exception is satisfied: the decision to include the CAPE CARTHAGE, with its removable bunk rails, in the National Defense Reserve Fleet involved an element of judgment or choice.

The parties disagree as to the second element of the discretionary function exception. The United States argues that the design of military equipment, such as the CAPE CARTHAGE, involves balancing many policy considerations while plaintiff avers that no such considertions, other than safety, exist. The Court is convinced that the decision to include the CAPE CARTHAGE in the National Defense Reserve Fleet involved the weighing of competing policy considerations that the discretionary function exception protects from judicial scrutiny. The statute authorizing the creation and maintenance of the National Defense Reserve Fleet establishes governmental policy that the Court must presume was furthered by the exercise of discretion to choose those vessels that best fit the nation's needs. 111 S. Ct. 1274. The statute makes it clear that Congress intended for the Secretary of the Treasury to have a great deal of latitude in creating the National Defense Reserve Fleet. Plaintiff asks the court to interject itself into that decision-making process. Congress did not intend for the Courts to have any role in approving the selection of vessels that were to be included in the fleet. As Chief Justice Burger stated in *Variq Airlines:*

> It was belived [by Congress] that claims of the kind embraced by the discretionary function exception would have been exempted from the waiver of

> sovereign immunity by judicial construction; nevertheless, the specific exception was added to make clear that the [Federal Tort Claims Act] was not to be extended into the realm of the validity of legislation or discretionary administrative action."

467 U.S. at 810. Thus, the exception was found to be implicit in the Suits in Admiralty Act. Even if the Suits in Admiralty Act did not contain an implied discretionary function exception, this Court would be inclined to hold that the United States is immune from suits like plaintiff's, based on the clear congressional intent expressed in the statute creating the National Defense Reserve Fleet. 50 U.S.C. App. § 1744.

Plaintiff contends that there was no rational policy justification for the United States' decision to include a vessel in the National Defense Reserve Fleet that had removable bunk railings. That argument requires the Court to second guess the Secretary of Transportation's exercise of discretion, which *Gaubert* clearly forbids. *Id.* at 1273-74. The decisions that the Secretary of Transportation must make in creating and maintaining the National Defense Reserve Fleet "call for determinations that lie outside sound judicial domain in terms of aptitute, facilities, and responsibility." *Carran v. Laird,* 420 F.2d 122, 129 (D.C. Cir. 1969).

Plaintiff gains no ground by arguing that although the choice of design is immune from suit, the United States was negligent in failing to correct the dangerous condition of the bunk rails after it purchaed the vessel. If plaintiff's argument were to prevail the discretionary function exception would be emasculated. *See Gordon, v. Lykes Bros. S.S. Co.,* 835 F.2d 96, 100 (5th Cir. 1988). Given that the decision to include

the CAPE CARTHAGE in the fleet is not subject to judicial review, the United States cannot be said to have breached its duty to correct the flaws in that very same design.

III. CONCLUSION

It is apparent from the face of the plaintiff's complaint that he challenges actions of the federal government that "involve the exercise of discretion in furtherance of public policy goals." *Gaubert*, 111 S. Ct. at 1279. His claims are, thus, barred by the discretionary function exception to the Suits in Admiralty Act. Accordingly,

IT IS ORDERED that the United States of America's motion for summary judgment is GRANTED and that plaintiffs claims are DISMISSED.

New Orleans, Louisiana, this 31 day of August, 1994.

/s/ E B Clement

EDITH BROWN CLEMENT
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

FILED
SEP 29 '94

DENNIS J. BALDASSARO	*	CIVIL ACTION
VERSUS	*	NO. 93-1871
UNITED STATES OF AMERICA	*	SECTION "N"

ORDER AND REASONS

Plaintiff's motion for new trial and/or to alter or amend judgment was decided this date on memoranda. For the reasons set forth below, plaintiff's motion to amend judgment is GRANTED.

In an Order & Reasons entered on August 21, 1994, this Court dismissed plaintiff's claims against the United States of America. This Court's ruling was predicated on a finding that the United States' sovereign immunity had not been waived. Plaintiff correctly points out that the Court's ruling did not address the question of whether he was entitled to the payment of maintenance and cure. For that reason, plaintiff's motion to amend is granted and the court will now address that question.

DATE OF ENTRY SEP 30 1994

As to plaintiff's entitlement to maintenance and cure there is no dispute and there is no need for a trial on that issue. The United States concedes that "it has an ongoing obligation to pay an injured seaman's maintenance and cure." The United States further agrees that it must continue to make these payments until Baldassaro has reached maximum medical cure. The court will thus amend its judgment to reflect this continuing obligation.

Baldassaro also urges this court to award him maintenance payments in excess of the rate specified in the Seafarer's Welfare Union collective bargaining agreement.[1] Plaintiff contends that $8.00 per day is so low that it abrogates the seaman's traditional right to be paid maintenance. The Court disagrees. Although a seaman's right to maintenance and cure may not be eliminated by contract, *Dowdle v. Offshore Express, Inc.*, 809 F.2d 259, 263 (5th Cir. 1987), this Court has held that a contractually agreed upon rate of maintenance binds the seaman unless that rate is so low that it consitutes "an abrogation of the duty to provide maintenance entirely." *Ballenger v. Bay Ship Management, Inc.*, 1993 A.M.C. 2239 (E.D. La. 1993). Although $8.00 per day may barely be sufficient to meet modern daily living expenses, it is not so unreasonable as to entirely abrogate defendant's duty to provide maintenance. Accordingly,

IT IS ORDERED that plaintiff's motion to amend judgment is GRANTED and that the judgment entered August 31, 1994 is hereby amended to read as follows:

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[1] The parties have stipulated that the collective bargaining agreement provides that seamen will be paid maintenance at the rate of $8.00 per day. They have further stipulated that plaintiff was a member of this union at the time of his injury.

IT IS ORDERED that plaintiff's motion to amend judgment is GRANTED and that the judgment entered August 31, 1994 is hereby amended to read as follows:

> IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the United States of America shall pay maintenance, at the rate of $8.00 per day, and cure to the plaintiff until it is determined that he has reached maximum medical cure.

In all other respects the judgment shall remain in force as originally rendered.

New Orleans, Louisiana, this 29 day of September, 1994.

/s/ E B Clement

EDITH BROWN CLEMENT
UNITED STATES DISTRICT JUDGE